No. 85-6759

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

Counsel for Petitioner

INDEX TO APPENDIX

Document	Page
Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc)	1a
Hitchcock v. Wainwright, 777 F.2d 626 (11th Cir. 1985) (opinion denying rehearing)	14a
Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1985)	17a
Section 921.141, Florida Statutes (1975)	34a
Section 921.141, Florida Statutes (1979)	36a
Order, United States District Court Middle District of Florida, Hitchcock v. Wainwright, No. 83-357-Civ-Orl-11	38a
Memorandum of Decision, United States District Court, Middle District of Florida, Hitchcock v. Wainwright, No. 83-357-Civ-Orl-11	40a

APPENDIX

James Ernest HITCHCOCK,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT,
Respondent-Appellee.

No. 83-3578.

United States Court of Appeals,
Eleventh Circuit.

Aug. 28, 1985.

Florida death row inmate sought federal habeas relief. The United States District Court for the Middle District of Florida, John A. Reed, Jr., J., denied writ, and petitioner appealed. The Court of Appeals, 745 F.2d 1332, affirmed, and vacated for rehearing en banc. On rehearing, the Court of Appeals, Roney, Circuit Judge, held that: (1) Florida law was not shown to have unconstitutionally discouraged petitioner's trial counsel from investigating and presenting nonstatutory mitigating evidence, and (2) sentencing judge was not required to set forth reasons why sentence imposed after trial was greater than life

sentence that would allegedly have been approved on guilty plea.

Affirmed.

Johnson, Circuit Judge, filed dissenting opinion in which Clark, Circuit Judge, joined, and in which Godbold, Chief Judge, Kravitch and R. Lanier Anderson, Circuit Judges, joined in part.

1. Habeas Corpus ⇐45.2(8)

In habeas corpus proceeding, Florida law was not shown to have unconstitutionally discouraged petitioner's trial counsel from investigating and presenting nonstatutory mitigating evidence, in that petitioner failed to show that trial counsel's presentation to the jury would have been appreciably different had it not been for possible confusion of petitioner's attorney as to the law on mitigating circumstances, and in that nonmitigating factors which petitioner contended should have been presented in greater detail were developed to some extent for the jury. West's F.S.A. § 921.141(6)(b).

2. Criminal Law ⇐273.1(2)

In "give-and-take" of plea bargaining, state may extend leniency to defendant who pleads guilty and foregoes his right to jury trial. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐273.1(2)

Legislative schemes which extend possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden assertion of constitutional rights or act to coerce inaccurate guilty pleas. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⇐273.1(2)

A judge, as much as prosecutor and legislature, should not be precluded from approving leniency in sentencing upon admission of guilt. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐986.2(6)

Absent demonstration by defendant of judicial vindictiveness or punitive action, defendant may not complain simply because he received heavier sentence after trial than that offered in plea bargain.

6. Criminal Law ⇐986(3)

In capital murder prosecution, sentencing judge was not required to set forth reasons why death sentence imposed after trial was greater than life sentence that would allegedly have been approved on guilty plea.

7. Criminal Law ⇐986(3), 986.2(6)

Trial court which approved sentence based on plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, or impose such sentence only for conduct occurring after aborted plea bargaining.

Richard B. Greene, Richard H. Burr, Craig Barnard, West Palm Beach, Fla., for petitioner-appellant.

Richard Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

RONEY, Circuit Judge:

This case was taken on rehearing *en banc* principally to consider two of several constitutional claims raised by petitioner James Ernest Hitchcock. He asserts (1) that at the time of his capital sentencing, Florida law unconstitutionally discouraged his attorney from investigating and presenting nonstatutory mitigating evi-

*Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

dence, and (2) that the trial court improperly considered petitioner's refusal to plead guilty in imposing a death sentence. The district court denied all claims raised by Hitchcock without conducting an evidentiary hearing. We affirm.

In January 1977, Hitchcock was convicted and sentenced to death for the murder of his brother's thirteen-year-old stepdaughter. The Florida Supreme Court affirmed his conviction and sentence. *Hitchcock v. State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 960, 74 L.Ed.2d 213 (1982). The denial of Hitchcock's state post-conviction motion to vacate judgment and sentence was likewise affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla.1983). After his federal petition for habeas corpus was denied by the district court, Hitchcock raised five issues on appeal. The panel opinion, one judge dissenting on two issues, affirmed the denial of relief as to all issues. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir.1984), *vacated for reh'g en banc*, 745 F.2d 1348 (11th Cir.1985).

With respect to his claims on sufficiency of the evidence, arbitrariness of the death penalty in Florida, and the *Brown* issue decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (*en banc*), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), we now reinstate the sections of the panel opinion denying relief. Although closely following the panel discussion, we set forth fully in the opinion for the *en banc* court the reasons for rejecting Hitchcock's other two claims.

I. *Restriction of Mitigating Evidence.*

[1] The confusion in Florida law surrounding nonstatutory mitigating evidence in capital sentencing has been discussed at length in prior decisions of this Court. *Hitchcock v. Wainwright*, 745 F.2d 1332, 1335–37 (11th Cir.1984); *Ford v. Strickland*, 696 F.2d 804, 813 (11th Cir.1983) (*en banc*), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238–39 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); *see also Songer v. Wainwright*, — U.S. —, 105 S.Ct. 817, 819–22, 83 L.Ed.2d 809, 812–14 (1985) (Brennan, J., dissenting from denial of certiorari). In summary, for six years after the Florida death penalty statute was reenacted in 1972, there was some ambiguity as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated in the statute. The opinions cited above set forth the manner in which this uncertainty first arose in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and was exacerbated by *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). The confusion was finally alleviated in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), after the United States Supreme Court had ruled in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record."

A number of Florida prisoners sentenced to death before *Songer* was decided have since sought constitutional relief, claiming that the confusion in Florida law inhibited investigation, presentation, and consideration of nonstatutory mitigating evidence at their capital sentencing. The basic legal problems have been addressed in a variety of contexts: as a *Lockett* challenge to the facial constitutionality of the death penalty statute itself as interpreted in *Cooper* by the Florida Supreme Court, *see Spinkellink v. Wainwright*, 578 F.2d 582, 620–21 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); as a claim that counsel was ineffective in failing to investigate or present nonstatutory mitigating evidence, *see Proffitt v. Wainwright*, 685 F.2d 1227, 1248 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 508,

78 L.Ed.2d 697 (1983) and *Songer v. Wainwright*, 571 F.Supp. 1384, 1393–97 (M.D. Fla.1983), *aff'd*, 733 F.2d 788, 791 n. 2 (11th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985); as a challenge to jury instructions as restricting the scope of mitigating evidence to that enumerated in the statute, *see Ford v. Strickland*, 696 F.2d 804, 813 (11th Cir.) (*en banc*) *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); *Foster v. Strickland*, 707 F.2d 1339, 1346–47 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984); and *Songer v. Wainwright*, 733 F.2d 788, 792 (11th Cir.1984); and as a claim arising under *Lockett v. Ohio* that Florida law as applied discouraged and prevented introduction of available nonstatutory mitigating evidence. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1335–37 (11th Cir.1984); *see also Songer v. Wainwright*, — U.S. —, 105 S.Ct. 817, 817, 83 L.Ed.2d 809, 810 (1985) (Brennan, J., dissenting from denial of certiorari).

To date, this Court has considered these claims on a case-by-case basis, evaluating the impact of Florida law on each individual petitioner's capital sentencing hearing. We now reaffirm that approach. The *en banc* Court has determined that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although generally an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing.

In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute.

The evidence proffered to the district court does not establish the right to constitutional relief. Although there was a proffer of evidence that the trial attorney may have been mistaken about Florida law, the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a good child and he minded her. Three of his siblings told the jury he was not a violent person. During closing

argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together ... consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. *Strickland v. Washington*, 466 U.S. 668, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141(6)(b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background information were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

II. *Life Sentence Offered for Guilty Plea—Death Sentence Imposed After Conviction.*

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it. We treat the case as if the defendant would have received a life sentence on a guilty plea.

[2–4] Although the principle of law that petitioner argues would apply on retrial and resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28–29, 94 S.Ct. 2098, 2102–03, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to

coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as much as the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

In criminal cases generally, sentencing after conviction following a failed plea bargain presents a different situation from sentencing on retrial after a reversal of a prior conviction or sentence. Upon a second conviction after a prior conviction has been set aside, a defendant stands in the same posture for sentencing as he did after his first conviction. Presumably the facts before the court for determination of the correct sentence would be the same in both instances. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. *See Wasman v. United States*, — U.S. —, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

A defendant who pleads guilty, however, is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation.

Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain, from a defendant's point of view, is the option of avoiding a possibly harsher sentence after conviction at trial.

[5] Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. *Blackmon v. Wainwright*, 608 F.2d 183 (5th Cir.1979), *cert. denied*, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would have received had he foregone trial to plead guilty does not invalidate the sentence. *Smith v. Wainwright*, 664 F.2d 1194, 1197 (11th Cir.1981).

[6] In capital cases particularly, there is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. The precise reasons for a death sentence are required by Florida statute to be set forth by the sentencing judge. The possibility of a different sentence because the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully

meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *United States v. Stockwell*, 472 F.2d 1186, 1187–88 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

[7] A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

The district court properly denied Hitchcock's petition for habeas corpus.

AFFIRMED.

JOHNSON, Circuit Judge, dissenting, joined by CLARK, Circuit Judge, and joined as to Part I by GODBOLD, Chief Judge, KRAVITCH and R. LANIER ANDERSON, III, Circuit Judges:

The district court denied habeas corpus relief to James Ernest Hitchcock without conducting an evidentiary hearing. The failure to conduct such a hearing should determine the outcome in this case, for two of the allegations of error raised by the petitioner are legally sufficient to require a grant of relief and the only real question is the truth of his factual allegations. We cannot at this point determine whether Hitchcock was convicted and sentenced in accordance with the Constitution, and should therefore remand the case for fact-finding by the district court. Accordingly, I dissent.

I. *Cooper/Lockett* claim

The petitioner in this case contends that Florida law at the time of his sentencing hearing was most reasonably interpreted to restrict the presentation of mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and that the interpretation of state law operated in his case to prevent him from presenting some mitigating evidence to the jury. The first half of this argument is virtually beyond dispute, while the second half can be properly evaluated only after an evidentiary hearing.

A. State law at the time of Hitchcock's trial

As the majority concedes, a progression of events from the enactment of the post-*Furman** Florida death penalty statute in 1972 to the time of his sentencing trial in 1977 created the possibility that state law would restrict improperly the types of mitigating evidence that could be presented. Whether such restrictions actually affected any particular sentencing hearing during this time must be determined on the facts of each case, and Hitchcock's claim must be viewed in light of the fact that at the time of his sentencing trial in 1977 the confusion regarding state law was at its very height. *Cf. Songer v. Wainwright*, 769 F.2d 1488 (11th Cir.1985).

Defense counsel, prosecutor and trial judge were all interpreting the statute in light of erroneous or misleading language in the statute itself, *compare* FLA.STAT. 921.141(2), (3) (describing task of jury and sentencing judge as balancing of aggravating circumstances against mitigating circumstances "as enumerated" in statute) *with* FLA.STAT. 921.141(5), (6) (aggravating circumstances "shall be limited" to eight categories, while mitigating circumstances "shall be" those contained in listed categories), and decisions of the Florida Supreme Court, including *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973) (statute creates "a system whereby the possible aggravating and mitigating circumstances are defined"), and *Cooper v. State*, 336 So.2d 1133, 1139 (Fla.1976) (upholding trial court's decision to exclude evidence on relevance grounds because proffered evidence bore no relevance to issue involved at sentencing pro-

* *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

ceeding: sole issue in capital sentencing "is to examine in each case the *itemized* aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding.") (Emphasis supplied). *See id.* at 1139 n. 7. The relevant law at this time has been described in greater detail elsewhere, *see Songer v. Wainwright*, — U.S. —, 105 S.Ct. 817, 819–22, 83 L.Ed.2d 809, 812–14 (1985) (Brennan, J., dissenting from denial of certiorari). Here it will suffice to note that the erroneous or confusing signals regarding mitigating evidence that were operating in this case were more plentiful than at any time before or since.

The confusion affected cases tried during this time other than this one. In *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), the court cited several cases in which it had affirmed sentences imposed after trial courts had allowed non-statutory mitigating circumstances into evidence. While it is possible to question the accuracy of each of the seven citations since they arguably involved statutory rather than non-statutory mitigating circumstances, Hitchcock does not claim that all Florida courts followed an unconstitutional interpretation of state law. Rather, he claims that the improperly restrictive view was possible under state law and was followed in a number of cases, including his own. Several facts tend to support his contention. First, none of the seven cases explicitly state in holding or dicta that a trial court may consider mitigating evidence outside the statute. Second, during the time that defendants in some cases were perhaps proffering non-statutory evidence, the Florida Supreme Court appeared to reaffirm in other cases the restrictive interpretation of *Cooper*. For instance, in *Gibson v. State*, 351 So.2d 948, 951–52 (Fla. 1977), the court found no mitigating circumstances present at all and simply recited the lower court's findings concerning the absence of statutory mitigation. *See also Perry v. State*, 395 So.2d 170, 174 (Fla.1981) (in trial before *Songer*, trial judge relied on *Cooper* and precluded evidence of non-statutory factors).

The possibility of an unconstitutionally restrictive application of the statute has been recognized by almost every federal appellate decision mentioning the issue. *Spaziano v. Florida*, — U.S. —, 104 S.Ct. 3154, 3158 n. 4, 82 L.Ed.2d 340 (1984) (Florida statute in effect in 1976 required consideration of only statutory mitigating factors); *Songer v. Wainwright*, 769 F.2d 1488 at 1489 (11th Cir.1985); *Foster v. Strickland*, 707 F.2d 1339, 1346 (11th Cir. 1983) (*Cooper* in direct conflict with *Lockett*); *Ford v. Strickland*, 696 F.2d 804, 812 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983) (same); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238 & nn. 18–19, 1248 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983) (Florida law in flux, reasonable to interpret as limiting mitigating evidence to statutory categories); *but see Spinkellink v. Wainwright*, 578 F.2d 582, 620–21 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979) (statute on its face does not improperly restrict use of mitigating circumstances). Thus, Hitchcock has successfully proven the first half of his argument, to wit, Florida law in February 1977 was highly susceptible to an interpretation that violated *Lockett v. Ohio*.

B. Effect of Florida law in Hitchcock's case

The petition for habeas corpus in this case forthrightly states that Hitchcock's trial counsel, Tabscott, believed that Florida law prohibited him from introducing mitigating evidence falling outside the confines of the statutory list. It also alleges that this understanding of state law directly caused him to pass over critical pieces of mitigating evidence.

The district court summarily dismissed the petition under Rule 4 of the Rules Governing Section 2254 Cases, without an evidentiary hearing. Under *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), summary dismissal is

proper only under limited circumstances. The majority in this case has necessarily concluded, therefore, that proof of the claim does not depend upon facts outside the record or that the allegations in the petition are "palpably incredible" or "patently frivolous or false." *Id.* at 76, 97 S.Ct. at 1630.[1] None of those conditions are present in this case.

The best factual support for the factual allegations in the petition appears in the affidavit of Tabscott stating that at the time of trial he believed that non-statutory mitigating factors were inadmissible. The majority correctly notes that this affidavit leaves many unanswered questions regarding Tabscott's understanding of state law at the time of sentencing and the effect that state law had on his conduct of the defense. No court has made findings of fact regarding Tabscott's understanding of state law. The existing record does not reveal whether and how Tabscott acted on his alleged beliefs regarding the restrictions of state law and there has been no evidentiary hearing regarding this matter. Although the Florida Supreme Court stated in Hitchcock's direct appeal that the trial judge had not erroneously limited the types of mitigating evidence presented to the jury because "the defense itself chose to limit that presentation," 413 So.2d at 745. The extent to which the affidavit falls short of proving the allegations of the petition only underscores the necessity for an evidentiary hearing.

The truth of Hitchcock's claim is also supported, but not established, by the existence of several pieces of evidence that could have been investigated and introduced at his trial if his attorney had not held a restrictive view of the statute. He describes extensive testimony that he could have elicited from family members and a law enforcement officer regarding the difficult circumstances of his childhood and his good prospects for rehabilitation. He also proffered before the district court the testimony of a psychologist who had examined Hitchcock. Her testimony related to the lingering possibility of Hitchcock's innocence (attacking the victim in a time of stress would have been an uncharacteristic response for Hitchcock) and to the possibility of rehabilitation.[2]

On the other hand, Hitchcock did present at the sentencing trial the testimony of his brother. The primary purpose of the testimony was to substantiate the existence of a statutory mitigating circumstance: substantial impairment of his ability to appreciate the criminality of his actions. To this end, the brother testified that Hitchcock had "sucked gas" as a child and that as a result his mind "wandered." The brother also related to the jury in brief fashion (two transcript pages) that Hitchcock had grown up on a farm, that his father had died of cancer, and that he had served as babysitter for several family members. These facts were not statutory mitigating evidence; yet Tabscott elicited the testimony only as background to the brother's testimony regarding the statutory factor, and did not stress it in closing argument or characterize it as a mitigating factor that could enter into the jury's formal balancing process. He stated that the jury should consider the background information "for whatever purposes you may deem appropriate." Tabscott also referred in passing to the evidence of Hitchcock's character presented earlier during the guilt-innocence

1. *Blackledge* also provides for summary dismissal when the petitioner has stated no claim upon which relief can be granted. The majority does not hold that Hitchcock's claim is insufficient as a matter of law.

2. The majority makes reference to the statutory mitigating circumstance involving mental and emotional conditions. These do not permit the inference, however, that state law could not have limited the presentation of available evidence. First, much of the available but unpre-

sented evidence had no connection with mental and emotional conditions. Second, the testimony of the psychologist would not fit under any of the statutory mitigating circumstances, for they refer to an "extreme mental or emotional disturbance" and to "substantial" impairment of the capacity to appreciate the criminality of one's conduct or to conform conduct to the requirements of law. FLA.STAT. § 921.141(6)(b), (f).

trial. At the close of his argument, he made the statement that the jury should consider "everything together," although it is far from clear whether he meant by this statement that the jury should consider all statutory and non-statutory mitigating evidence or simply that they should weigh in whatever way they saw fit the mitigating evidence that the law permitted them to consider.

The preceding overview of the evidence presented at sentencing confirms that some evidence not strictly related to statutory mitigating factors was placed before the jury. The question is whether this renders "palpably incredible" or "patently false" Hitchcock's allegation that state law restricted the presentation of mitigating evidence. The only reasonable conclusion is that it does not.

The opinion in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), states that the sentencer must be able to hear *any* mitigating evidence relating to the defendant's character or record or the circumstances of the offense, not just some evidence outside the bounds of a statutory catalogue. It should not matter whether the restriction of mitigating evidence is a complete failure to mention the evidence or the failure to develop it fully and incorporate it into the defense. The issue to be resolved in an evidentiary hearing would be causation rather than the type of restriction involved. Did state law really cause counsel to restrict the presentation of mitigating evidence?

A lawyer might believe that state law prohibits the use of non-statutory mitigating evidence and could still introduce some evidence of that type and make passing reference to it in the belief that it would not provoke an objection so long as the reference is brief and unimportant. Similarly, a lawyer may feel free to mention evidence during closing argument that was adduced during the guilt-innocence trial, in the belief that the restrictions of state law apply primarily to the introduction of evidence at sentencing and do not place such stringent limits on closing arguments. Each of these explanations is consistent with the record and with each of the allegations of the petition; none of them are palpably incredible or patently false.

The majority's willingness to assume no causal link between Tahscott's interpretation of state law and his presentation of the defense stands in marked contrast to the court's recent decision in *Songer v. Wainwright*, 769 F.2d 1488 at 1489 (11th Cir. 1985). In that case the court was confronted with evidence that a trial judge had believed that state law prohibited him from considering non-statutory mitigating evidence as he reached a decision regarding the appropriate sentence. The en banc court granted habeas corpus relief despite the lack of conclusive evidence regarding a causal link between the judge's beliefs and the sentence imposed; for it was not clear just what mitigating evidence the trial court had refused to consider as a result of his statutory interpretation. *Songer* should demonstrate that once a petitioner establishes that a restrictive interpretation of state law could have limited the type of mitigating evidence presented to or considered by the sentencer, incomplete evidence of a causal link between the operation of state law and the mitigating evidence actually considered or presented will not defeat the claim. Hitchcock is entitled to an evidentiary hearing at least as clearly as Songer deserved habeas corpus relief.

In sum, the truth of the factual allegations in the petition remains an open question that should be answered in an evidentiary hearing. Hence it is not proper to deny habeas corpus relief on this claim at this stage of the proceedings.

II. Plea Negotiations

During a pretrial conference, the state court judge allegedly told Hitchcock's lawyer that he would impose a life sentence if the defendant pleaded nolo contendere, an offer that Hitchcock refused. No transcript of this conference was ever made but Hitchcock's attorney executed a contemporaneous affidavit documenting the refused offer. Hitchcock claims that the death sentence was imposed upon him as punishment for his decision to reject this plea offer by the trial court. The death sentence, he argues, was an improper burden on his right to a jury trial.

In order to decide whether there is a need for further factfinding, it is necessary to determine (1) whether, assuming Hitchcock's allegations are true, he has stated a claim upon which relief can be granted, (2) whether the state court's factual findings on this matter are sufficient and correct.

A. Sufficiency of claim

The majority assumes that the facts were just as Hitchcock alleged: the trial court and the prosecutor offered in conference before trial to accept from Hitchcock a plea of nolo contendere in exchange for a life sentence, an offer which Hitchcock refused. The same trial court imposed the death sentence on Hitchcock without stating on the record the reasons for increasing the punishment from life imprisonment. The majority then holds that these facts are insufficient to state a basis for relief.

Normally the initiation and breakdown of plea negotiations would not prevent the court from imposing a sentence heavier than the one originally offered. Under *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), a prosecutor may in the give-and-take of plea bargaining make an offer and then later seek a more severe punishment. But this was no ordinary breakdown in bargaining; for two reasons. First, the court became involved in the negotiations; second, the sentence imposed was death.

The fact that the court itself offered the life sentence to Hitchcock makes this case similar to *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless the reasons for doing so affirmatively appeared on the record. Any other result would imply that a defendant was being punished for exercising the constitutional right to appeal or to attack collaterally a conviction.

The involvement of the trial court was important to the finding of a due process violation in *Pearce*: "It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 395 U.S. at 724, 89 S.Ct. at 2080 (quoting *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir.1966). While *Pearce* did involve sentencing at retrial rather than a first trial, the right to stand trial in the first instance is no less fundamental than the right to appeal that was involved in *Pearce*, and the mechanism for burdening the defendant's right carries the same appearance of impropriety whenever the court brings its coercive power to bear in negotiations. Indeed, the Ninth Circuit has found the analogy between the two situations persuasive enough to construct a general constitutional rule against judicial involvement in plea negotiations. "Once it appears on the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty." *United States v. Stockwell*, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

Such an application of *Pearce* might not be constitutionally mandated; it is certainly unnecessary here. Disclosure of reasons for enhanced sentences in all cases of judicial involvement in plea negotiations might not be constitutionally required because, as the majority points out, vindictiveness is more likely to motivate harsher sentences after appeal and retrial than after rejection of a plea bargain: in the latter case, the proof at trial is available to explain the enhanced sentence.[3] Yet Hitchcock's case

3. On the other hand, Supreme Court precedent certainly does not foreclose the *Stockwell* rule. *Bordenkircher* involved negotiations between a prosecutor and a defendant, parties of roughly equal strength, whereas the participation of the court is more markedly coercive to the defend

does not call for a constitutional rule applying to all judicial involvement in plea negotiations. The fact of judicial involvement in plea negotiations is joined in this case by the fact that the enhanced sentence is the sentence of death.

The majority's attempt to address the problem of judicial involvement in the plea bargaining process completely ignores the peculiarly coercive impact of a threatened death penalty. It is true, as the majority states, that prosecutors may participate in plea-bargaining. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and legislators may within certain limits create statutes that reward defendants for foregoing trial. *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). Yet legislatures are restricted in their use of the death penalty to induce guilty pleas. For instance, in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he plead guilty but could receive a death sentence if he chose trial. The Court stated that where the assertion of the right to a jury trial could cost a defendant his life, the statute "needlessly encourages" guilty pleas. And in *Corbitt v. New Jersey*, 439 U.S. 212, 217, 99 S.Ct. 492, 496, 58 L.Ed.2d 466 (1978), the Court approved a statute extending leniency in return for a guilty plea in non-capital cases, but noted that "the death penalty, which is unique in its severity and irrevocability" was not involved. The same limits applicable to legislative use of the death penalty threat as an incentive to defendants should apply with equal force to judges.

Moreover, the unusually coercive power of the threat of a death sentence is heightened further when the threat comes directly from the judge, who plays a critical and sometimes decisive role in the capital sentencing process. Judges are not limited in their power to punish a defendant for insisting on the right to trial by weighing that fact in determining the sentence as prosecutors and legislators are. Prosecutors do not have the power themselves to determine sentence, and the legislature must pass general legislation without singling out particular defendants. The particularly sensitive and coercive role of the judge in the defendant's decision to plead guilty has been often noted in the context of Fed.R.Crim.P. 11. *See United States v. Adams*, 634 F.2d 830 (5th Cir.1981). The majority's equation of legislators, prosecutors and judges does not account for the uniquely coercive power held by judges.

Assuming, then, that the judge in this case did offer a reduced risk of receiving the death penalty in order to induce a plea of guilty, this case involves the confluence of two coercive factors that have been limited by the Constitution in other contexts. It would be most in keeping with the due process limitations set forth in *Pearce*, *Jackson*, and *Corbitt* to restrict the participation of courts in plea-bargaining in capital cases. Whether those restrictions took the form of an absolute prohibition or a requirement that the reasons for the imposition of the death sentence despite the earlier offer of life appear on the record, Hitchcock would have stated a claim.

B. State court factfinding

Before the trial judge sentenced Hitchcock, his attorney made a statement to the court on his behalf. At one point during the remarks, the attorney referred to the court's involvement in an earlier plea negotiation:

> MR. TABSCOTT: I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.
>
> THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.

ant. The due process clause should come into play in cases posing the greatest risk of coercion, including those cases where judicial involvement is greatest.

> MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

This is the entire factual record before this court relating to Hitchcock's claim. When this claim was pressed before the Florida Supreme Court, the record also contained an affidavit completed by Tabscott at the time of the plea offer, stating that "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment." The prosecutor completed an affidavit three years after the sentencing that contradicted Tabscott's version: "Judge Paul indicated that he would consider [the State's] recommendation, should the ... defendant actually plead guilty as charged."

The Florida Supreme Court ultimately rejected Hitchcock's claim by making a factual finding. It stated that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. There is nothing in the record even hinting that the trial court imposed the death penalty because Hitchcock chose to have a jury trial." 413 So.2d at 746.

The warden now contends that this is a factual finding entitled to the presumption of correctness of 28 U.S.C.A. § 2254(d). Of course, the statement that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty" can only be construed as finding of historical fact, not a legal conclusion. But the Florida Supreme Court reached its findings by reviewing conflicting affidavits and ambiguous statements in the trial transcript. It did not remand for an evidentiary hearing despite the availability of the affiants. Moreover, the finding reached by the court relied exclusively on the affidavit completed years after the event and ignored the affidavit created at the time of the plea offer. The court also made a logical jump from the trial court's statement that "there was no understanding" to the conclusion that the trial court never had to "consider" the offer. The trial court's statement could also have meant that it considered an offer and extended the offer, which was then rejected by the defendant.

Under these circumstances, the Florida Supreme Court cannot be said to have reached its findings of fact after a full and fair hearing, 28 U.S.C.A. § 2254(d)(2), and the finding was not supported by the record as a whole, 28 U.S.C.A. § 2254(d)(8). Thus, the statutory presumption of correctness does not apply. The district court should be ordered to hold an evidentiary hearing to resolve the conflict in the existing record and determine whether the trial court attempted to induce Hitchcock to plead guilty by threatening him with an increased chance of receiving the death penalty if he went to trial. I therefore dissent from the majority's holding that denies relief to Hitchcock before the facts relevant to his adequate legal claim have been developed.

Court for the Middle District of Florida, John A. Reed, Jr., J., denied writ and prisoner appealed. The Court of Appeals, 745 F.2d 1332, affirmed. On rehearing en banc, the Court of Appeals again affirmed, 770 F.2d 1514. On petition for rehearing en banc, the Court of Appeals held that standards for granting rehearing under Rule 40 are applied when rehearing of an en banc court is sought and senior judge who sat on the en banc court on the decision of the case may participate in the consideration of the petition.

Petition denied.

Johnson, Circuit Judge, dissented and filed an opinion in which Kravitch, J., joined.

Federal Courts ⇐744

When an en banc court has decided a case, petition for rehearing of that decision will be treated as a petition under Rule 40 for rehearing, addressed to all judges who sat on the en banc court, standards for granting rehearing under Rule 40 will be applied to consideration of the petition, which need not meet the standards required for the granting of rehearing en banc under Rule 35, and a senior judge who sat with the en banc court on the decision of the case shall participate in the consideration of the petition for rehearing. 28 U.S.C.A. § 46(c); F.R.A.P. Rule 40, 28 U.S.C.A.

James Ernest HITCHCOCK, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-3578.

United States Court of Appeals, Eleventh Circuit.

Nov. 19, 1985.

Death row inmate sought federal habeas corpus. The United States District

Richard B. Greene, Richard H. Burr, Craig Barnard, West Palm Beach, Fla., for petitioner-appellant.

Richard Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE,

KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

This case was heard *en banc*. *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985).

A petition for rehearing has been filed seeking rehearing of that decision. When the *en banc* court has decided a case, and rehearing of that decision is sought, the petition will be treated as a F.R.A.P. Rule 40 Petition for Rehearing, addressed to all judges who sat on the *en banc* court. The standards for granting rehearing under Rule 40 will be applied in consideration of the petition.

Once the case is taken *en banc*, the petition for rehearing need not meet the standards required for the granting of rehearing *en banc* under F.R.A.P. Rule 35. A senior judge who sat with the *en banc* court on the decision of the case, pursuant to 28 U.S.C.A. § 46(c), shall participate in the consideration of such petition.

The petition for rehearing in this case is DENIED.

GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge, concur in this opinion.

JOHNSON, Circuit Judge, dissenting, in which KRAVITCH, Circuit Judge, joins:

Petitioner has asked for a rehearing *en banc* of the decision of the *en banc* court. The majority holds that this petition for rehearing will be treated as a F.R.A.P. Rule 40 Petition for Rehearing. In consequence, the petition does not have to meet the standards required for the granting of rehearing *en banc* under F.R.A.P. Rule 35, and consideration of the petition is not limited to judges in regular active service. This action allows a senior circuit judge, who participated in the *en banc* decision, to also participate in the consideration of the petition for rehearing *en banc*.

F.R.A.P. Rule 40, which specifies the procedures to be followed in petitioning for rehearing, says that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended...." The focus of the petition for rehearing is thus to enable the court to correct its mistakes. The petition is addressed to the three-judge panel which has decided the case. This Circuit does not limit consideration of such petitions to judges in regular active service.

In contrast, F.R.A.P. Rule 35 states that rehearings of the court of appeals *en banc* are "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Participation in the decision of whether to rehear a case *en banc* is limited to those "circuit judges who are in regular active service." F.R.A.P. Rule 35.

The Supreme Court has held that, although a senior circuit judge who participated in the original panel that decided a case can participate in the *en banc* rehearing of that case, no senior circuit judge can participate in any decision of whether or not to grant an *en banc* rehearing of a case. *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974). The basis of the Court's decision was that Congress has explicitly vested the power to decide whether to rehear a case *en banc* in the "circuit judges of the circuit who are in regular active service." *Id.* at 627, 94 S.Ct. at 2516. The Court held that Congress appeared to have contemplated that the decision to rehear a case *en banc* "is essentially a policy decision of judicial administration" that requires the "intimate and current working knowledge" of the

* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

circuit possessed by judges in regular active service. *Id.* at 626–27, 94 S.Ct. at 2516.

The rationale for enabling senior circuit judges to participate in the decision of whether to grant a rehearing *en banc* in a case just decided by the *en banc* court is that such a rehearing would be simply to correct mistakes; the policy decision to rehear the case *en banc* would already have been made. Whether or not this rationale is sound, it conflicts with Congress' express prohibition on senior circuit judges participating in the decision to rehear a case *en banc*. *Id.* at 626–27, 94 S.Ct. at 2516–17; F.R.A.P. Rule 35. By its plain language, this prohibition covers the decision of whether to hear "an appeal or other proceeding" before the *en banc* court. F.R.A.P. Rule 35. Since an *en banc* decision falls within the meaning of "an appeal or other proceeding," the decision of whether to rehear an *en banc* decision before the *en banc* court has been expressly limited to judges in regular active service.

I respectfully dissent.

James Ernest HITCHCOCK,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT,
Respondent-Appellee.

No. 83-3578.

United States Court of Appeals,
Eleventh Circuit.

Oct. 18, 1984.

Opinion on Granting Rehearing En Banc Jan. 8, 1985.

Florida death row inmate sought federal habeas relief. The United States District Court for the Middle District of Florida, John A. Reed, Jr., J., denied writ, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) there was no constitutional infirmity in death penalty hearing as regards restriction on evidence of mitigating circumstances; (2) although life sentence was offered for rejected guilty plea, there was no constitutional violation in imposition of death sentence after conviction following trial; (3) evidence was sufficient to prove that petitioner committed sexual battery by force; (4) legislature's recataloguing of rape as sexual battery did not make statutory aggravating factor referred to as "rape" so vague as to be susceptible of arbitrary application; and (5) although former practice of charging on all lesser degrees of an offense regardless of supporting evidence may have introduced some distortion into

fact finding process, no Eighth Amendment problem was created.

Affirmed.

Johnson, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⟹986.1

Florida prisoner, sentenced to death, failed to show any constitutional violation in nature of limitation on mitigating evidence at capital penalty hearing as there was no showing that counsel would have done anything different had there been no confusion as to law on mitigating circumstances, and elements of petitioner's character and other background information were testified to by petitioner as well as his relatives, and trial counsel reminded jury of those facts during closing in the penalty phase. West's F.S.A. § 921.141; U.S.C.A. Const.Amends. 8, 14.

2. Criminal Law ⟹986.2(6)

Rules governing imposition of greater punishment on retrial and resentencing after successful appeal do not apply to failure of a plea bargain and a greater sentence following trial. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ⟹273.1(2), 986.2(6)

Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas.

4. Criminal Law ⟹986(3), 986.2(6)

A trial court which approves a sentence based on a plea bargain prior to trial need not, on rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, or impose such sentence only for conduct occurring after the aborted plea bargain, notwithstanding that plea bargain is for life in prison whereas death penalty is imposed after trial, provided there is no showing of judicial vindictiveness or punitive action. U.S.C.A. Const.Amends. 5, 14.

5. Habeas Corpus ⟹92(1)

Test for sufficiency of the evidence on habeas corpus is whether viewing the evidence in the light most favorable to the government no rational trier of fact could have found proof of guilt beyond a reasonable doubt. U.S.C.A. Const.Amends. 5, 14.

6. Homicide ⟹354

A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder, but where defendant himself participates in both the felony and the intentional killing, that principle does not apply.

7. Homicide ⟹230
Rape ⟹52(3)

Evidence, including medical examination revealing that 13-year-old child was previously of chaste character, was sufficient to prove that petitioner committed sexual battery by force and was sufficient to show that homicide, i.e., strangulation following sex act, occurred intentionally, not accidentally in course of an unrelated felony.

8. Criminal Law ⟹1206.1(2), 1208.1(5)

Florida legislature's recataloguing of rape as sexual battery in the statute books did not make the death penalty statutory aggravating factor referred to as "rape" so vague as to be susceptible of arbitrary or capricious application, and where instructions at guilt phase described the felony of sexual battery, which is equivalent to traditional crime of rape, and in penalty phase charge the court again used the term "sexual battery" instead of "rape," the statutory aggravating factor mentioning rape was not applied in an arbitrary manner. West's F.S.A. §§ 794.011, 921.141.

9. Habeas Corpus ⟹30(1)

Florida prisoner waived any right to complain about instructions as to lesser degree offenses, specifically, that at time of trial Florida required instructions on all lesser degrees of charged offenses even when there was no evidence to support such offenses, because the instructions given were the ones he requested and petitioner waived any right to object to Florida law instructing on lesser degrees in other cases by his failure to object at trial or on direct appeal.

10. Criminal Law ⟹1213.3

Although, under Florida's system, as used at time of death penalty inmate's trial, if the defense requested, the court had to instruct on all lesser degrees of the charged offense regardless of supporting evidence, and although then existing practice may have introduced some distortion by allowing for jury pardon, no Eighth Amendment problem was created. West's F.S.A. RCrP Rule 3.490; U.S.C.A. Const. Amends. 8, 14.

Richard B. Greene, Richard H. Burr, Public Defender of Florida, Craig Barnard, West Palm Beach, Fla., for petitioner-appellant.

Richard Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge:

James Ernest Hitchcock was convicted and sentenced to death for the strangulation of his brother's thirteen-year-old stepdaughter. After a direct appeal and post-conviction proceedings in the Florida state courts,[1] Hitchcock petitioned the federal district court for a writ of habeas corpus. The district court denied the writ without an evidentiary hearing. We affirm.

Petitioner Hitchcock raises numerous issues on this appeal: (1) whether Florida law discouraged his attorney from investigating and presenting nonstatutory mitigating factors, (2) whether the trial court considered petitioner's refusal to plead guilty in imposing the death sentence, (3) whether the evidence was sufficient to support his conviction, (4) whether the death penalty in Florida has been imposed in arbitrary and capricious manner either because of (a) a defect in Florida's death penalty statute, Fla.Stat.Ann. § 921.141, (b) Florida law which required the jury be instructed on all lesser degrees of the charged offense whether or not there was evidence to support a conviction on the lesser degrees, or (c) racial discrimination, and (5) whether the *Brown* issue as decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), should be reconsidered. We will address each issue in that order.

The facts of the case can be briefly summarized. Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Driggers' hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial petitioner changed his story. He testified his brother Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

Restriction of Mitigating Evidence

Petitioner argues the district court should have held an evidentiary hearing on the question of whether he was denied a fair and individualized capital sentencing determination by the preclusion of nonstatutory mitigating factors as a result of either the operation of state law or the denial of effective assistance of counsel because

1. Petitioner's conviction and sentence were affirmed by the Florida Supreme Court in *Hitchcock v. State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 21[illegible] (1982). Petitioner's motion to vacate judgment and sentence was denied in state circuit court and the Florida Supreme Court affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla.1983).

of his counsel's belief that Florida law barred such evidence. After examining the law regarding admission of mitigating evidence as developed in both Florida and federal courts and reviewing the facts of this case, we conclude no constitutional infirmity exists in regard to petitioner's sentencing hearing.

Florida reenacted its death penalty statute following *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which in effect held all extant capital penalty statutes to be unconstitutional. The new statute contained a list of factors designed to guide discretion in the imposition of the death sentence. Both aggravating and mitigating factors were listed. The statute explicitly limited those circumstances that could be considered as aggravating. No such restrictive language, however, was used in conjunction with the mitigating circumstances. *See* Fla.Stat. § 921.141 (1972). This feature was noted by the Supreme Court in its opinion holding the statute to be constitutional. *Proffitt v. Florida*, 428 U.S. 242, 250 n. 8, 96 S.Ct. 2960, 2965 n. 8, 49 L.Ed.2d 913 (1976) ("There is no such limiting language introducing the list of statutory mitigating factors.").

The importance of a lack of restriction on the sentencer's consideration of mitigating circumstances in fixing the penalty for a capital crime was confirmed by the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). The Court held unconstitutional an Ohio statute which limited mitigating evidence to a narrow set of factors. As to the distinction between the Ohio and the Florida statute, the Court made the following observation:

> Although the Florida statute approved in *Proffitt* contained a list of mitigating factors, six members of the Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ... None of the statutes we sustained in *Gregg* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606–07, 98 S.Ct. at 2965–66.

Two years prior to *Lockett* and six days after the decision in *Proffitt*, the Florida Supreme Court in *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), used language which some contend should be interpreted as limiting the introduction of mitigating circumstances to those enumerated in the statute. The court upheld a trial court's refusal to admit testimony regarding a capital defendant's employment history as a mitigating circumstance. The defendant argued that his employment history demonstrated he was not beyond rehabilitation. Neither employment history nor potential for rehabilitation are statutory mitigating factors. *See* Fla.Stat.Ann. § 921.141(6). The court rejected the defendant's argument, reasoning that employment history was not particularly probative of a person's ability to conform to the law and that

> [i]n any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand that list.

336 So.2d at 1139. In a footnote, the court emphasized the restrictive design of the Florida statute as regards to both aggravating and mitigating factors, stressing that the statute only would limit the arbitrariness condemned in *Furman* if discretion was limited "whether operating for or against the death penalty." 336 So.2d at 1139 n. 7. *See Perry v. State*, 395 So.2d 170, 174 (Fla.1980) (trial judge interpreted *Cooper* as barring non-statutory mitigating evidence).

Two years later and shortly after the decision in *Lockett*, the Florida Supreme Court in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), clearly held the Florida death penalty statute does not restrict the mitigating evidence to the

[illegible] enumerated in the statute. In denying a motion for rehearing which argued that the Florida statute as interpreted by *Cooper* violated *Lockett*, the Florida court said:

> In *Cooper*, this Court was concerned not with whether enumerated factors were being raised as mitigation but with whether the evidence offered was probative. ... Chief Justice Burger, writing for the majority in *Lockett*, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n. 12. *Cooper* is not apropos to the problems addressed in *Lockett*.
>
> As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in *Washington v. State*, 362 So.2d 658 (Fla.1978); *Buckrem v. State*, 355 So.2d 111 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); *Meeks v. State*, 336 So.2d 1142 (Fla.1976); *Messer v. State*, 330 So.2d 137 (Fla.1976); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), among others. Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered.

365 So.2d at 700 (footnote omitted).

Prior to that decision, this Court had addressed the issue of whether Florida's death penalty statute as interpreted in *Cooper* violated *Lockett*. In *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), we reviewed *Proffitt* and *Lockett* and stated "[t]he conclusion is inevitable that the [Supreme] Court continues to view Section 921.141 as constitutional. ... Obviously, we are without power or authority to overrule the express finding of the Supreme Court." 578 F.2d at 621. Spinkellink was tried in 1973, prior to *Cooper*. Spinkellink presented and argued to the jury circumstances not fitting within the statutory mitigating categories.

Petitioner here was tried in January, 1977, which was after the Florida court's decision in *Cooper* but before the United States Supreme Court's decision in *Lockett*. Thus, petitioner argues that his counsel, misled by *Cooper* and without the clarification of *Lockett* and *Songer*, believed that he was limited to presenting evidence in mitigation that fit within one of the statutorily enumerated listings. In one context or another, this basic legal problem has been argued to this Court several times since *Spinkellink* but in no case has relief been granted because of *Cooper*.

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), it was argued that Proffitt's trial attorney was ineffective because he failed to present evidence of nonstatutory mitigating circumstances during the penalty phase of his trial in March, 1974. The Court indicated that at the time of Proffitt's trial which was prior to *Cooper*, it was reasonable to assume that evidence of nonstatutory mitigating circumstances was not admissible. 685 F.2d at 1248. In that case, however, the attorney testified that he believed that he could fit any mitigating evidence within the statutory mitigating factors and that, in any event, the defendant had instructed him not to introduce mitigating evidence. 685 F.2d at 1238–39.

In *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), it was argued that the jury instructions at the penalty phase of his trial restricted the jury from considering nonstatutory mitigating circumstances. Ford did not object to the instructions at trial or on direct

appeal. The Court denied relief because Ford had not been limited in the admission of mitigating evidence and thus could show no prejudice. 686 F.2d at 813.

A similar issue was involved in *Foster v. Strickland*, 707 F.2d 1339, 1346–47 (11th Cir.1983), and the Court again held that no prejudice was shown because the petitioner did not suggest any supported nonstatutory mitigating evidence in the habeas corpus proceeding.

[1] In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute. Based on our prior precedents, the district court properly denied relief and an evidentiary hearing. The evidence proffered to the district court does not establish the right to constitutional relief. The record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time. In *Proffitt*, this Court denied relief on a record where the defendant's attorney testified unequivocally that at the time of trial he understood the Florida statute as limiting the mitigating evidence that could be introduced to that falling within the statutory mitigating circumstances. Although the attorney testified he believed he could fit any mitigating evidence within that scope, this Court stated that

> the defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla.Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

Proffitt, 685 F.2d at 1248.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a good child and he minded her. Three of his siblings told the jury he was not a violent person. During closing argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together ... consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated

lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. *Strickland v. Washington*, — U.S. —, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141(6)(b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background information were elicited by petitioner's brother, sister, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

Life Sentence Offered for Guilty Plea—Death Sentence Imposed After Conviction

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it.[2] We treat the case as if the defendant would have received a life sentence on a guilty plea.

[2, 3] Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28–29, 94 S.Ct. 2098, 2102–2103, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty, foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v.*

2. MR. TABSCOTT [defense counsel]: I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence on that plea. I have nothing further.
THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding because your client didn't want to consider any plea.
MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And it is true he declined to enter that plea.
THE COURT: Any other matters?
MR. TABSCOTT: No, sir.

New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 221 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

Sentencing after conviction following a failed plea bargain presents a different situation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of the correct sentence. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. *See Wasman v. United States*, — U.S. —, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). A defendant who pleads guilty, however, is in a markedly different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a "substantial benefit to the state."

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1472. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain from a defendant's point of view is the option of avoiding a possibly harsher sentence upon conviction at trial.

There is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. *Blackmon v. Wainwright*, 608 F.2d 183 (5th Cir.1979), *cert. denied*, 449 U.S. 862, 101 S.Ct. 165, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would have received had he foregone trial to plead guilty does not invalidate the sentence. *Smith v. Wainwright*, 664 F.2d 1194, 1197 (11th Cir.1981).

That the death penalty is involved in this case does not alter the principle of law. Given the different situations presented by a defendant who pleads guilty and a defendant convicted after trial, the possibility of different sentences depending on whether or not the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason...." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *United States v. Stockwell*, 472 F.2d 1286, 1287-88 (9th Cir.) *cert. de-*

nied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

[4] A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

Sufficiency of the Evidence

In petitioner's guilt-innocence trial, the jury was instructed that it could find petitioner guilty of first degree murder upon alternative theories: premeditated murder or felony murder. The jury returned a general verdict of guilty of first degree murder.

[5, 6] Petitioner argues that the prosecution failed to prove felony-murder because the facts did not show that the felony of sexual battery had occurred but that the evidence supported his claim that the victim consented to sexual relations. He contends that since it cannot be determined on which theory the jury based its verdict, the conviction must be reversed. The issue turns on whether there was sufficient evidence to support the felony murder theory without running afoul of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

"[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient...." *Zant v. Stephens*, 462 U.S. 862, — 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235, 252 (1983); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). The test for sufficiency of the evidence on habeas corpus is whether viewing the evidence in the light most favorable to the Government "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979). *Cosby v. Jones*, 682 F.2d 1378, 1379 (11th Cir.1982). A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378. Where the defendant himself participates in both the felony and the intentional killing, that principle does not apply. *Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

[7] The evidence at trial showed that petitioner was temporarily staying at his brother's house. On the night in question, he returned to the house at a late hour and entered through a window. Petitioner admitted having sexual relations with his brother's thirteen-year-old stepdaughter. The young girl complained he had hurt her and that she was going to tell her parents. A medical examination revealed the girl was previously of chaste character. This evidence was sufficient to prove that petitioner committed sexual battery by force. The evidence was sufficient to show that the homicide occurred intentionally, not accidentally in the course of an unrelated felony.

Arbitrariness of Death Penalty in Florida

[8] Petitioner raises three different arguments in support of the contention that the imposition of the death penalty in Florida violates the Eighth and Fourteenth Amendments. First, petitioner asserts that at the time of his trial the commission of rape in conjunction with the capital felony was listed as a statutory aggravating factor although the Florida legislature had replaced the crime of rape with the crime of sexual battery.

One of the aggravating factors in Florida's post-*Furman* death penalty statute was: "[t]he capital felony was committed while defendant was engaged ... in the commission of ... rape ..." Fla.Stat. § 921.141 (1972). In 1974, the Florida legislature rewrote the rape statute. 1974 Fla.Laws ch. 74-121 § 1. The legislature created the new crime of sexual battery which was broader than the repealed statutory crime of rape. *See* Fla.Stat.Ann.

s 794.011. In 1976, the Florida Supreme Court dropped all reference to rape as an aggravating factor when it repromulgated its standard jury instructions. *Florida Standard Jury Instructions in Criminal Cases* at 77–82 (1976). The death penalty statute has now been amended to include the term sexual battery. 1983 Fla.Laws ch. 83-216 § 177.

There is no merit to petitioner's contention that at the time of petitioner's trial the law had become so unclear that it was likely to be applied in an arbitrary and capricious manner. The jury instructions at petitioner's guilt-innocence trial described the felony of sexual battery which is equivalent to the traditional crime of rape.[3] In charging the jury during the penalty phase, the court again used the term sexual battery instead of rape. The statutory aggravating factor mentioning rape thus was not applied in an arbitrary manner in petitioner's case. Contrary to petitioner's assertion, the legislature's recataloguing of rape as sexual battery in the statute books did not make the statutory aggravating factor referred to as rape so vague as to be susceptible of arbitrary or capricious application. *See Hitchcock v. State*, 413 So.2d 741, 747–48 (Fla.), *cert. denied*, 459 U.S. 860, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

[9] Second, petitioner argues that at the time of his trial Florida required instructions on all lesser degrees of the charged offense even when there was no evidence to support these lesser offenses, thus rendering the system arbitrary and capricious. Petitioner waived any right to complain about the instructions as to lesser degree offenses in this case because the instructions given are the ones he requested. He waived any right to object to Florida's law on instructing on lesser degrees in other cases by his failure to object at trial or on direct appeal. *Ford v. Strickland*, 696 F.2d at 816–17. No "cause" for this failure to object can be shown because one of the major cases which forms the basis of petitioner's argument, *Roberts v. Louisiana*, 428 U.S. 325, 334–35, 96 S.Ct. 3001, 3006–07, 49 L.Ed.2d 974 (1976), was decided the year before his trial. *See Reed v. Ross*, — U.S. —, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

[10] In any event, the argument that Florida's system is unconstitutional because in some cases lesser degrees of the charged crime are instructed without factual support is without merit. At the time this case was tried, there was a difference in the treatment of lesser degrees of a charged crime and lesser included offense. Florida law has always prohibited instructions on lesser-included offenses unless the lesser-included offense is necessarily included in the charged offense or there is evidence to support a conviction on the lesser-included offense. *Gilford v. State*, 313 So.2d 729, 732–33 (Fla.1975); *Brown v. State*, 206 So.2d 377, 384 (Fla.1968); *see* Fla.Stat. § 919.14 (1969) (replaced by Fla.R.Crim.P. 3.490, Fla.Rules of Court). If the defense requested, however, the court at that time had to instruct on all lesser degrees of a charged offense whether or not the evidence supported those lesser degrees. *Gilford*, 313 So.2d at 731. This was true even though "[i]n many cases the elements of the lesser degrees are totally distinct from the offense charged." *Brown*, 206 So.2d at 381. In 1981, the Florida Supreme Court amended the procedural rule which mandated this result. *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla.1981). The rule now requires that the trial court charge only on those lesser degrees supported by the evidence. Fla.R.Crim.P. 3.490.

Although Florida's former practice of charging on all lesser degrees may have introduced some "distortion into the fact-finding process" by allowing for jury pardon, *see Spaziano v. Florida*, — U.S. —, —, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984); *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), no Eighth Amendment problem was created. Florida juries were not faced with a choice of convicting on a lesser offense not supported by the evidence in order to avoid imposing the death penalty. It was this combination of a mandatory death sentence for murder and the required charging on lesser offenses that the Supreme Court condemned in *Roberts v. Louisiana*, 428 U.S. at 334–35, 96 S.Ct. at 3006–07, as leading to arbitrary results violative of the Eighth Amendment.

Third, petitioner's claim that the death penalty is applied in a racially discriminatory manner in Florida depends on the same statistical study rejected by this Court in *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir.), *aff'd.* — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *see Spinkellink v. Wainwright*, 578 F.2d 582, 612–616 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The Supreme Court has held this argument to be without merit. *Wainwright v. Ford*, — U.S. —, 104 S.Ct. 3498, — L.Ed.2d — (1984); *see Sullivan v. Wainwright*, — U.S. —, — - — & n. 3, 104 S.Ct. 450, 451–52 & n. 3, 78 L.Ed.2d 210, 212–13 & n. 3.

Brown Issue

Petitioner raises the so-called *Brown* issue decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), and suggests we reconsider our decision based on an argument mentioned in a concurring opinion in *Ford*. The *Brown* issue involved a claim by 125 death row inmates, including petitioner, that the Florida Supreme Court had examined nonrecord information during its appellate review of their sentences. This Court, sitting *en banc*, held that no constitutional violation had occurred. *Ford v. Strickland*, 696 F.2d at 811. This panel is bound by that decision.

AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's disposition of this case on two issues: (1) petitioner's claim that he was denied an individualized sentencing hearing as required by the Eighth and Fourteenth Amendments to the Constitution and recognized in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and (2) petitioner's claim that the trial court's imposition of the death sentence after his rejection of a proffered guilty plea by the court violated his rights as guaranteed by the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. Since I would hold that petitioner has clearly stated a claim on which relief may be granted on both of these grounds and that proof of these claims depends in part on facts outside the record before us, I would remand this case to the district court for an evidentiary hearing as to both claims. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Petitioner's sentencing hearing was held on February 4, 1977. At that time, the post-*Furman* 1972 Florida capital sentencing statute governing the sentencer's consideration of mitigating factors, Fla.Stat. Ann. § 921.141(2) and (6), had been interpreted in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Cooper v. State*, 336 So.2d 1133 (Fla.1976). In *Proffitt v. Florida*, the Supreme Court in considering the constitutionality of Florida's capital sentencing scheme as a whole noted that, unlike the statute's limitation of the sentencer's consideration of aggravating factors to those listed in the statute, "[t]here is no such limiting language introducing the list of statutory mitigating factors." 428 U.S. at 250 n. 8, 96 S.Ct. at 2965

3. The judge charged the jury that:
It is a crime to commit sexual battery upon a person over the age of 11 years, without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious physical injury.
Sexual battery means oral, and, or vaginal penetration by, or union with, the sexual organ of another.
This language tracks the current sexual battery statute. Fla.Stat.Ann. § 794.011(h)(3). Sims repealed Fla.Stat. 794.01 read as follows:
(2) whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will . . . shall be guilty of a life felony . . .

n. 8. Or, as the Court later stated in *Lockett v. Ohio*:

> In *Proffitt v. Florida*, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. . . . None of the statutes we sustained in *Gregg* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606, 607, 98 S.Ct. at 2965, 2966. Six days after the decision in *Proffitt v. Florida*, *Cooper v. State* was decided by the Florida Supreme Court. In *Cooper*, the Florida Supreme Court apparently held, in language quoted in full below,[1] that Section 921.141 did limit the sentencer's consideration of mitigating factors to those listed in the statute. Later cases binding on this Court have so interpreted *Cooper*. *Ford v. Strickland*, 696 F.2d 804, 812 (11th Cir.1983) (en banc) ("Ford contends he cannot be faulted for failing to raise the issue because Florida Supreme Court decisions decided prior to trial indicated only statutory mitigating circumstances could be considered. The court ruled explicitly to this effect two years after trial in *Cooper v. State* . . . . *Lockett v. Ohio*, . . . a direct reversal of this view, was not decided until two years later . . . ."); *Foster v. Strickland*, 707 F.2d 1339, 1346 (11th Cir.1983); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238 and n. 18 (11th Cir.1982). *Cooper* was the controlling decision of Florida law in effect at the time of petitioner's sentencing trial.

Two years after the decision in *Cooper* and one year after petitioner's sentencing trial, *Lockett v. Ohio*, *supra*, was decided. In *Lockett*, the Supreme Court held that the limitation of a sentencer's consideration to an exclusive statutory list of mitigating factors violated the Eighth and Fourteenth Amendments. Two months later, in *Songer v. State*, 365 So.2d 696 (Fla.1978) (on rehearing), the Florida Supreme Court rejected a *Lockett* challenge to the statute based on *Cooper*. The court found that the *Cooper* language concerning the exclusivity of statutory mitigating factors was dicta and that "*Cooper* is not apropos to the problems addressed in *Lockett*." *Id.* at 700. The court held that its construction of Section 921.141(6) since enactment had been that "all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered." *Id.*

In light of this history, I agree with the majority that at the time of petitioner's sentencing trial, after *Cooper* but before the clarification in *Songer*, the statute was, at best, ambiguous, capable of both a constitutional construction in accordance with *Lockett* as not limiting the sentencer's consideration to statutory mitigating factors, as in *Proffitt v. Florida*, and an unconstitutional construction that the statutory list of mitigating factors was exclusive, as in *Cooper*. *See Proffitt v. Wainwright*, *supra*, 685 F.2d at 1238 and nn. 18, 19. Stated differently, as the petitioner argues at the time of his sentencing trial, the statute was unconstitutional as due to its ambiguity.[2]

As with all but certain First Amendment claims based on a statute's ambiguity, however, petitioner must also demonstrate that the unconstitutional interpretation of the statute was actually followed at his sentencing trial, that, in short, the statute was unconstitutional as applied to him. To meet the element of stating a claim on which relief may be granted, petitioner alleges that the unconstitutional *Cooper* interpretation of the statute affected his sentencing proceeding because his counsel reasonably relied on *Cooper* as the controlling statement of Florida law in his preparation and presentation at the sentencing trial. Unlike the majority, I cannot conclude based on this record that petitioner's allegations in support of his claim, "conclusively show that the [petitioner is] entitled to no relief," or that these allegations are so "palpably incredible . . . so patently frivolous or false" that summary dismissal is warranted. *Blackledge v. Allison*, *supra*, 431 U.S., at 74, 76, 97 S.Ct. at 1628, 1630. To the contrary, the lack of any evidentiary hearing in the state or district courts to develop a record by which we can evaluate this claim and the proffer of evidence supporting this claim by the petitioner in the district court demonstrate that the petitioner is entitled to an evidentiary hearing on the issue of whether the unconstitutional construction of the statute actually affected the course of his sentencing proceeding.

In support of his motion for an evidentiary hearing in the district court, petitioner alleged that his trial counsel, Tabscott, would testify that at the time he represented petitioner at the sentencing trial he believed that *Cooper* limited the sentencer's consideration to statutory mitigating factors, and that Tabscott would testify that he "focused upon the statutory mitigating circumstances in his pretrial investigation and preparation as well as in his presentation of evidence and argument at trial." Petitioner proffered an affidavit by Tabscott in support of these allegations. In this affidavit, Tabscott states that "during my representation of Mr. Hitchcock my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute."

Petitioner further alleged, and proffered evidence in support of his allegations, that significant evidence of nonstatutory mitigating factors could have been presented at his sentencing hearing "had Mr. Tabscott believed that the law permitted the presentation of such evidence." Petitioner proffered the testimony and report of a psychologist who had examined him as establishing the nonstatutory mitigating factors that his behavior in committing the crime was inconsistent with his established patterns of behavior and that he had great

1. W. held in *State v. Dixon* [283 So.2d 1 (Fla.1973)] that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. *The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal.* Such evidence threatens the proceeding with the undisciplined discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)."

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law abiding. Cooper has shown that he has

2. The majority misreads the *Cooper*-*Lockett* claims made by the petitioner. As both the briefs and the oral argument make clear, petitioner first claims that due to its ambiguity the statute was unconstitutional as applied to him and further that the unconstitutional interpretation of the statute deprived him of effective assistance of counsel by the operation of state law. [illegible] in this allegation

potential for rehabilitation.[3] Petitioner also proffered testimony and affidavits of various family members attesting his difficult childhood and his good character.

The record of petitioner's sentencing hearing does not contradict the affidavit of petitioner's counsel that he believed only statutory mitigating factors could be presented at his hearing. Nor does the record reveal that substantial nonstatutory mitigating evidence was in fact presented. Only one witness, the petitioner's brother, testified at the sentencing hearing as to circumstances that could arguably be identified as nonstatutory mitigating factors: the petitioner's father had died of cancer, petitioner's mother worked on a farm, and the witness had allowed petitioner to babysit his children. Further testimony from this witness that petitioner's habit of "sucking on" automotive gasoline seemed to affect him mentally was argued by counsel as a statutory psychological mitigating factor. The bulk of the argument by petitioner's counsel was an evaluation of whether the statutory mitigating factors did or did not apply in this case. Petitioner's counsel reminded the sentencing jury of earlier testimony concerning petitioner's background, but he did not argue this testimony as a mitigating factor, asking only that the jury consider it "for whatever purposes you may deem appropriate." In short, the slender evidence from the state sentencing hearing record that some mitigating factors not listed in the statute were, to a limited extent, before the sentencing jury does not conclusively establish that petitioner's counsel in fact believed that such evidence could be, and was, presented and fully argued to the jury as nonstatutory mitigating factors.

Nor does the precedent of this Court indicate that petitioner's proffer was insufficient to entitle him to an evidentiary hearing. *Proffitt v. Wainwright, supra*, rejected a claim of ineffective assistance of counsel based on an attorney's affidavit that he had relied on an interpretation of Florida law that precluded the presentation of nonstatutory mitigating factors:

> [T]he defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla.Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

685 F.2d at 1248. The petitioner in this case, unlike the petitioner in *Proffitt*, challenges the Florida statute as applied to him. As a necessary step in his argument that the statute was ambiguous and that the unconstitutional interpretation of the statute governed his sentencing hearing through his attorney's reliance on *Cooper*, petitioner claims that his attorney reasonably relied on *Cooper*. *Proffitt*, then, in fact supports petitioner's attack on the statute. In *Ford v. Strickland, supra*, this Court held that the jury instructions given at the defendant's sentencing hearing did not result in the jury's perceiving that it was limited only to the consideration of statutory mitigating factors because both the trial court and counsel did not so perceive the law. In *Foster v. Strickland, supra*, the Court held that no prejudice had been shown from the defendant's failure to object to similar jury instructions because the defendant did not proffer any nonstatutory mitigating evidence to support his claim. Neither *Ford* nor *Foster* speaks to the present case in which the petitioner has proffered both evidence that his counsel perceived Florida law to limit the presentation of mitigating evidence to those factors listed in the statute and evidence that substantial nonstatutory mitigating evidence was available.

3. Contrary to the majority's suggestion, this evidence, although produced through a psychologist's evaluation, does not also fall within the statutory mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Fla.Stat.Ann. § 921.141(6)(b).

[illegible]

[illegible] I would hold the evidence proffered by the petitioner to the district court [illegible] sufficient to entitle him to an evidentiary hearing [illegible] that, but for his counsel's reasonable reliance on the Florida [illegible] interpretation of the statute as precluding the introduction of nonstatutory mitigating evidence, such evidence would have been investigated and presented at his sentencing hearing. Although the inference is clear from the affidavit and petitioner's allegations, I recognize that the proffered affidavit does not explicitly state this causal relationship between counsel's reliance on *Cooper* and the course of his sentencing hearing. This does not, however, as the majority seems to assume, require a summary dismissal of petitioner's claims, but rather it is in both law and logic further demonstration of the need for an evidentiary hearing in this case. We cannot conclusively determine from the evidence before us whether petitioner's allegations of this causal relationship are indeed fact. If, as petitioner alleges, his counsel's reliance on *Cooper* as limiting the sentencer's consideration to statutory mitigating factors precluded counsel from investigating or presenting available evidence of nonstatutory mitigating factors, then petitioner has demonstrated that the unconstitutional interpretation of the ambiguous statute did affect his sentencing hearing and relief should be granted.

I would further hold that petitioner has stated a claim of constitutional deprivation through his allegations that, prior to trial, the trial court approved of the prosecution's offer of a plea agreement of life imprisonment, and thus the trial court at least implicitly agreed to impose life imprisonment as a sentence if petitioner were to accept this offer, and after trial the court sentenced petitioner to death without making written findings as to why before trial a life sentence was proper and after trial the death sentence was imposed.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), relied on by both the majority and the district court, does not apply to the present case. *Bordenkircher* involved the limited factual situation where a state prosecutor carried out a threat to re-indict the defendant on a more serious charge if the defendant did not plead guilty. *Bordenkircher* did not involve either the court's participation in the plea bargaining process or the possible sentence of the death penalty. Both of these factors, present in this case, [illegible] the proper analysis from that in *Bordenkircher* and demonstrate that petitioner has stated a claim of constitutional deprivation.

In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless "the reasons for [its] doing so ... affirmatively appear [in the record]." *Id.* at 726, 89 S.Ct. at 2081. In the absence of such record evidence, the chilling effect of an inference that the defendant was being punished for exercising his constitutionally protected right to appeal or collaterally attack his conviction was held to violate the Fourteenth Amendment's Due Process Clause.

Relying on the equally protected constitutional right to trial by jury, and the equally recognized principle that the "Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial," due to the chilling effect on the exercise of this right, *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir.1981), the Ninth Circuit has held in noncapital cases that:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir.1973).

Moreover, the Supreme Court has expressly recognized that the Eighth Amendment's heightened due process reliability requirement in capital cases applies with equal force to permissible plea bargaining practices. In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Supreme Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he pleaded guilty but could

receive a death sentence if he chose to stand trial. In *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), the Supreme Court approved the practice of extending leniency for a guilty plea in noncapital cases, but expressly noted that "the death penalty, which is 'unique in its severity and irrevocability,' is not involved here." *Id.* at 217, 99 S.Ct. at 496 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2941, 49 L.Ed.2d 859 (1976)). Justice Stewart, the author of *Bordenkircher*, concurred in the result in *Corbitt* on the grounds that *Jackson* did not apply because the death penalty was not involved and *Bordenkircher* did not apply because it simply involved the prosecutor acting within the adversary system and not a state statute as in *Corbitt*. 439 U.S. at 226-27, 99 S.Ct. at 501-02.

Finally, the Supreme Court has recognized the unique power of the death penalty to coerce guilty pleas and thus chill the exercise of the constitutionally protected right to trial by jury. In *Jackson*, the Court stated that, because "assertion of the right to jury trial may cost [a defendant] his life," the Federal Kidnapping Act invented the exercise of this right. 390 U.S. at 572, 88 S.Ct. at 1211. The evil in the statute was "not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly *encourages* them." *Id.* at 583, 88 S.Ct. at 1217.

In light of this precedent, it is clear the Eighth Amendment's requirement that a decision to impose the death sentence be, and appear to be, based on reason," *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), is not met by a system in which the trial court tenders a life sentence as part of a plea bargain before trial and then imposes the death sentence without explanation after the defendant has exercised his right to stand trial. The inference that the defendant is being punished by the ultimate sanction for exercising his constitutionally protected right to trial is without record evidence to the contrary, unacceptable. I would therefore hold that petitioner's allegations state a claim under the Eighth Amendment and the Fourteenth Amendment's Due Process Clause.

A transcript of the plea conference at which the alleged offer to accept a life sentence in return for a guilty plea was either tendered to defendant and his counsel or approved by the trial court is not a part of the record now before this Court. No evidentiary hearing to determine the accuracy of petitioner's crucial allegation that the trial court in fact approved such an offer has been held in either the state courts or the district court. Instead, the sole evidence before this Court on this issue are remarks made at petitioner's sentencing hearing, *see* majority opinion, *supra*, at note 2, which are ambiguous at best and are insufficient to evaluate the accuracy of petitioner's claim. I therefore would hold that petitioner is entitled to an evidentiary hearing in the district court on this issue.[4]

standing because your client didn't want to consider any plea."

Id.

Petitioner notes that the record before the Florida Supreme Court consisted solely of the remarks made during sentencing and was supplemented only by affidavits of both petitioner's counsel and the prosecutor. The affidavit of petitioner's counsel, executed contemporaneously with the trial proceedings, states "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that [petitioner] would be sentenced to life imprisonment." The prosecutor's affidavit is to the contrary. "Judge Paul indicated that he would consider [the State's] recommendation, *should* the defendant actually plead guilty as charged." Petitioner also argued to the Florida Supreme Court that, should it find the record insufficient and the affidavits contradictory, it should remand to the state habeas court for an evidentiary hearing. Based on these facts, petitioner claims that the Florida Supreme Court's full-blown procedure

4. The warden-appellee argues that the Florida Supreme Court on direct appeal made historical findings of fact on this issue entitled to the statutory presumption of correctness under 28 U.S.C.A. § 2254(d). On direct appeal, the Florida Supreme Court rejected the petitioner's claim that "the trial court offered him a sentence of life imprisonment in return for a plea of nolo contendere as charged and thus that the trial court imposed the death sentence because he exercised his right to a jury trial." 413 So.2d at 746. The Florida Supreme Court concluded:

> Hitchcock's version of the facts surrounding this point is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain. When defense counsel reminded the judge during sentencing proceedings of the plea negotiations, the judge responded, "there was never any under-

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, ROONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the court en banc *with* oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs.

CHAPTER 921

SENTENCE

cable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH — Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SEN-

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY — Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practi-

TENCE. — The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the said supreme court.

(6) AGGRAVATING CIRCUMSTANCES — Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(7) MITIGATING CIRCUMSTANCES — Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History — s. 27a, ch. 19654, 1939; CGL 1940 Supp. 8483.288; s. 119, ch. 71-136; s. 1, ch. 72-724; s. 8, ch. 72-724; s. 1, ch. 74-379.

*Note — Structural word inserted by the editors.

Note — Former s. 919.23.

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237.a, ch. 19654, 1939; CGL 1940 Supp. 8663-248; s. 119, ch. 71-136, s. 1, ch. 72-72, s. 9, ch. 72-724, s. 1, ch. 74-379, s. 248, ch. 77-104, s. 1, ch. 77-174, s. 1, ch. 79-353.

Note.—Former s. 919.23.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES ERNEST HITCHCOCK,

Petitioner,

vs. No. 83-357-Civ-Orl-Cl

LOUIE L. WAINWRIGHT, etc.

FILED
SEP 22 5 11 PM '83
CLERK U.S. DISTRICT COURT
MIDDLE DIST. OF FLA.
ORLANDO, FLORIDA

O R D E R

For the reasons set forth in the Memorandum of Decision filed on even date herewith the court finds that an evidentiary hearing and further oral argument are unnecessary. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Amended Petition for Writ of Habeas Corpus filed herein on 9 June 1983 is hereby dismissed.

FURTHER ORDERED that the stay of execution ordered by this court on 17 May 1983 shall terminate at 12:00 o'clock noon on 17 October 1983.

The Clerk of this court shall mail by certified mail a copy of this order and the Memorandum of Decision to the Petitioner, his attorneys, and the attorneys for Respondent. The Clerk of this Court shall also provide

telephone notice of this order to the Clerk of the United States Court of Appeals for the Eleventh Circuit and shall thereafter mail to said Clerk by certified mail a copy of this order and the Memorandum of Decision.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of September, 1983.

JOHN A. REED, JR.
Judge

Copies mailed to:

Richard B. Greene, Esquire
Richard H. Burr, III, Esquire
Assistant Public Defenders
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401

Richard B. Martell, Esquire
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

Mr. James Ernest Hitchcock
Florida State Prison
Box 747
Starke, Florida 32091

Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
SEP 5 11 PM '83
CLERK, U.S. DISTRICT COURT
MIDDLE DIST. OF FLORIDA
ORLANDO, FLORIDA

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

No. 83-357-Civ-Orl-11

MEMORANDUM OF DECISION

James Ernest Hitchcock filed a Petition for a Writ of Habeas Corpus on 13 May 1983 and thereafter filed an Amended Petition for a Writ of Habeas Corpus on 9 June 1983. On 31 May 1983, Respondent filed a Motion to Dismiss. On 17 June 1983, the Motion to Dismiss was argued and treated by the court and the parties as having been directed to the Amended Petition. The court has reviewed the Amended Petition against the Motion to Dismiss and, as contemplated by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, has independently reviewed the Amended Petition for arguable merit. The court has included in its review of the Amended Petition the entire state court trial record. The record was filed by the Respondent and is referred to at length in the Amended

Petition. On the basis of its review, the court has concluded that the Amended Petition for habeas corpus relief lacks arguable merit.

The first ground asserted by the Petitioner is that the evidence was insufficient to support the felony murder theory. The pertinent homicide statute is § 782.04(1)(a), Fla. Stat. (1975). It provided: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of . . . any . . . involuntary sexual battery . . . shall be murder in the first degree and shall constitute a capital felony . . .". The pertinent statute defining sexual battery is § 794.011, Fla. Stat. (1975). It provided:

> A person who commits sexual battery upon a person over the age of eleven years, without that person's consent, and in the process thereof . . . uses actual physical force likely to cause serious personal injury shall be guilty of a life felony . . .

The statute defines the phrase "serious personal injury" as "great bodily harm or pain, permanent disability, or permanent disfigurement." (Emphasis added).

The Petitioner's confession which was introduced in evidence as a part of the state's case in chief contains an admission by the Petitioner that early in the morning of 31 July 1976 he entered the bedroom of his brother's thirteen year old stepdaughter and had sexual intercourse with her. Following this, according to the Petitioner's own confession, she stated that she was hurt and desired to tell her mother. The Petitioner admitted in his confession that he struck her and carried her from the house, choked her to death and hid her body. Testimony presented also in the state's case in chief by Guillermo Ruiz, the medical examiner for Orange County, established that the victim had abrasions on her neck and also had evidence of trauma to her left eye and laceration around her left eye. Dr. Ruiz also testified that the girl's hymen had been lacerated within twenty-four hours before her death and that hair and sperm were found in her vagina.

The age of the victim, the fact that she was of previously chaste character, her insistence on telling her mother and the Petitioner's admission as to the time of the occurrence could have led a reasonable jury to the conclusion that the sexual relationship was not consensual. The same evidence also suggests that physical force likely

Court, however, in the direct appeal in this case concluded that the error was harmless. This court's review of the record leads it to the same conclusion. As mentioned above, there was adequate evidence to take the case to the jury on the felony murder theory. The Petitioner's defense counsel anticipated the possibility that the motion would be denied and presented testimony dealing with the consensual nature of the sexual relations between the Petitioner and the victim. Furthermore, there is nothing in the record to suggest that the defense counsel's strategy was adversely affected by the court's ruling.

The third ground asserts that the trial court kept out nearly all of the evidence proffered by the Petitioner in support of his defense. Petitioner's defense was that his brother Richard had killed the victim. To support his theory, the Petitioner tried to show that his brother Richard had a reputation for violence whereas he, the Petitioner, treated young children well. The Petitioner also argues with respect to this ground that he was denied an opportunity "to show why he would have initially confessed . . . despite his innocence . . .".

The transcript of the testimony negates the validity of the third ground. Evidence of the Petitioner's character for nonviolence was repeatedly admitted through his own witnesses and to some extent through the testimony of his brother Richard and his sister-in-law (Richard's wife) Judy, both of whom were called as witnesses for the state.

Judy Hitchcock testified that in July 1976 the Petitioner was living in her home with her children and Richard. She testified she never saw the Petitioner hit or discipline any of the children (T. 267). Richard Hitchcock testified for the state that the Petitioner got along "all right" with the children.

Roy Carpenter, Sgt. Rick Dawes, Archie Sooter, Martha Hitchcock, James Hitchcock, Pay Hitchcock and Brenda Reed were witnesses called by the Petitioner. Carpenter testified that on the day after the "incident" (meaning the day on which the victim's body was found) when he saw the Petitioner in Winter Garden, the Petitioner said he wanted to organize a search party to look for his niece. Carpenter

testified he never knew the defendant to commit "violence" (T. 725). Sgt. Rick Dawes of the Winter Garden Police Department testified that the Petitioner came into the Winter Garden Police Department on 31 July 1976 and surrendered peacefully (T.227). Sooter testified he was a former roommate of the Petitioner (T. 731). He described the Petitioner's character as "calm and jovial" (T. 732) and testified the Petitioner had a girlfriend to whom he never saw the Petitioner direct any violence (T. 733).

Martha Hitchcock, the Petitioner's sister, testified that she lived with the Petitioner for over thirteen years and never knew him to be a violent person T. 737). James Hitchcock, one of the Petitioner's older brothers, gave similar testimony (T. 739). James Hitchcock also testified the Petitioner stayed for an unspecified period with him and his three children (T. 741-742). Pay Hitchcock, the wife of James Hitchcock, testified she had known the Petitioner for nine years and had never known him to exhibit violence (T. 744). Brenda Reed, another sister of the Petitioner, testified she had never known him to exhibit violence (T. 747).

The testimony reveals that when the Petitioner was taken into custody he did not, contrary to the allegation in the Amended Petition, initially confess to the killing of Cynthia Driggers. The Petitioner testified that on the day of his arrest, he denied any involvement. It was not until four days later that he confessed (T. 771-772). At trial, the Petitioner explained in detail why he confessed. His first reason was that he had been in isolation for a period of four days and wanted to die (T. 772). His second reason was that his girlfriend had left him (T. 772). Then the Petitioner explained that he had been on his own since age thirteen and was then age twenty. He further testified his father died when he was only six (T. 773-774). The final reason which he advanced for changing his testimony was that his brother Richard had been like a father to him and because of Richard's arthritic condition he "couldn't see him (Richard) doing this time" (T. 777). After that statement, the Petitioner said, "But from what my parents have stated to me and shown to me, I've took a crime for him before . . ." At this point an objection to the testimony was voiced by the state's attorney and the objection was sustained. Although there was no order from the court

striking any portion of the testimony, the objection could only have been understood as having gone to the hearsay statement attributable to the Petitioner's parents. Hence, the record does not reflect that the Petitioner was prevented from developing his character for nonviolence or explaining why he made a confession totally inconsistent with his trial testimony. The transcript does indicate, however, that the Petitioner's attempts to introduce evidence related to Richard's character or reputation for violence were routinely rebuffed (T. 737, 740, 744, 777-778, 750-751, 794-795).

Normally rulings on the admission of evidence are not a basis for habeas corpus relief. Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. Unit B, 1982). Where, however, such rulings preclude a defendant from adducing highly relevant testimony in support of his defense, they may of course constitute a denial of the Fourteenth Amendment's guarantee of a fair trial. Green v. Georgia, 442 U.S. 95 (1979); Wilkerson v. Turner, 693 F.2d 121, 123 (11th Cir. 1982). The issue then becomes whether or not the exclusion of the proffered testimony dealing with Richard's violent character and Petitioner's having

previously taken some blame (i.e. "took a crime") for Richard was so relevant to the defense that its exclusion denied the Petitioner a fair trial.

Evidence of a person's character or a trait of character is usually not admissible to prove that he acted in conformity therewith on a particular occasion. See Rule 404(a), Fed. R. Evid. Whatever slight relevance such evidence might have is not sufficient to overcome the policy which favors its exclusion to protect reputation and to diminish the possibility of misleading the trier of fact. The reputation of Richard for violence had such slight probative value to support the Petitioner's contention, this court cannot conclude that its exclusion denied the Petitioner a right to a fair trial. The evidence shows without question that Richard was married to the mother of the thirteen year old victim and had been living with her and her four minor children (including the victim) for a period of at least two years before the murder (T. 273-274). Under these circumstances, there is just simply no logical connection between the proferred testimony and the fact sought to be corroborated. Similarly the proffered hearsay evidence was of such minimal significance its exclusion did not violate Petitioner's right to due process.

The fourth ground for relief asserts that a communication between the trial court and the jury in the absence of defense counsel denied Petitioner a fair trial. During the course of the jury deliberations, the jury sent a note to the trial judge which asked: "Is it required for us to recommend death penalty or life at this time?" The trial judge without consulting counsel for the Petitioner or the state responded: "You should not consider any penalty at this time - only guilt or innocence." See Record, page 165. The Petitioner argues that this communication to the jury denied him due process. According to Petitioner, it implied that the trial judge viewed the Petitioner as guilty and at the same time suggested to the jury that it should not consider the seriousness of the possible penalty in arriving at a verdict as to guilt or innocence. In the opinion of this court, the argument is frivolous. The trial judge had earlier given the jury without objection an instruction virtually identical to that included in his response to the jury's note. At the close of the evidence on the guilt phase of the trial, the judge instructed the jury:

> You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty. . . . [I]f you return a verdict of guilty of Murder in the First Degree, you will then be called on, in a separate sentencing proceeding, to return an Advisory Sentence as to whether the punishment should be death or life imprisonment, which Advisory Sentence the Court is not required to follow. When you have determined the guilt, or innocence of the accused, you have completely fulfilled your solemn obligation under your oaths as Jurors.

The trial judge also instructed the jury in the following language that the decision on guilt or innocence was theirs and that no comment by him should be taken as implying his view as to guilt or innocence:

> Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find.

Finally, it is obvious from the note itself that the jury was well aware that the death penalty was a possible sanction attendant upon the conviction. Nothing in the judge's response could rationally be said to have

diminished the seriousness of the offense in the jury's mind.

The fifth ground for relief is that the aggravating circumstances considered by the jury failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. The first argument advanced in support of this ground is that the aggravating circumstance of sexual battery was not supported by adequate evidence. As noted above, the record contains adequate evidence to support the felony of sexual battery as defined in § 794.011(3), Fla. Stat. (1975).

The Petitioner also argues under this ground that the catalog of aggravating circumstance delineated in the death penalty statute refers to "rape" not sexual battery. See § 921.141(5)(d), Fla. Stat. (1975). When the Florida death penalty statute was initially adopted, the term "rape" was used in Florida to denote the well-known offense. See § 794.01, Fla. Stat. (1973). Unfortunately the term was not modified in the death penalty statute when in 1974 the Florida legislature redefined "rape" in a comprehensive statute using the terminology "sexual battery". See

§ 794.01, Fla. Stat. (1974). Rape was defined in the statutes of Florida in effect when the death penalty statute was first enacted as follows:

> 794.01 Rape and forcible carnal knowledge; penalty.-
> (1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony, punishable as provided in § 775.082.

§ 794.01(1), Fla. Stat. (1973). The offense of rape as thus defined is for all practical purposes the same as "sexual battery" defined in the present Florida statute and included in the trial judge's charge.

The remaining contentions which the Petitioner makes in support of the ground in question simply take issue with the validity of the aggravating circumstances which may be considered under the Florida death penalty statute. The statute, however, has been held to be constitutional and the Petitioner's argument is thus foreclosed. See Proffitt v. Florida, 428 U.S. 242 (1976), and Barclay v. Florida, No. 81-6908, ___ U.S. ___ (6 July 1983).

The Petitioner's sixth ground for relief is that "(his) death sentence was imposed in proceedings which precluded by operation of law the consideration of relevant mitigating circumstances in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence." With respect to this ground, the Petitioner argues that the trial judge refused to consider as mitigating the evidence relating to the Petitioner's mental and emotional problems, his voluntary surrender, the evidence as to his nonviolent character, doubt of guilt, and the fact that the state offered a life term in return for a plea of guilty. The short answer to this contention is that the trial judge was not required to consider those factors as mitigating. As pointed out in Barclay v. Florida, supra, the sentencing decision calls for the exercise of judgment. The only requirement of the Constitution is that the judgment be directed by suitable statutory guidelines. The trial judge stated before pronouncing sentence: "The court has weighed and considered the total evidence received in this case . . . " See transcript of Sentencing Proceedings 11 February 1977, at page 6.

Also under this ground, the Petitioner argues that the judge limited the jury's consideration to the list of mitigating circumstances set forth in the Florida death penalty statute. It is true that the jury was instructed on the mitigating circumstances delineated in § 921.141(6), Fla. Stat. (1977); however, the jury was not precluded from consideration of any relevant evidence offered in mitigation of punishment. The trial judge told the jury its consideration of aggravating circumstances was limited to the statutory list. In contrast, he instructed the jury with reference to mitigating circumstances:

> Should you find, however, sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances which you have found to exist. The mitigating circumstances which you may consider shall be the following: . . . [the statutory mitigating circumstances] . . . If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive and (sic) in arriving at your conclusion as to the sentence which should be imposed.

Transcript of Advisory Hearing at 55-58.

Furthermore, no restriction was imposed on the evidence which Petitioner offered at the sentencing trial, and, in fact, testimony was adduced of nonstatutory mitigating circumstances dealing with his family background. In his argument to the advisory jury defense counsel discussed at some length Petitioner's family history, his nonviolent character, including the fact of his voluntary surrender, and his capacity for rehabilitation if offered a life sentence (T. of Advisory Hearing p. 12-26). The Petitioner's argument is foreclosed by Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) because, for the reasons mentioned, neither the jury nor the trial judge was denied the use of any relevant evidence of mitigation. See also Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); mod. on rehr. No. 82-5120, Slip Op. 6 Sept 1983.

Finally, the Petitioner argues that available evidence in mitigation was not presented either because defense counsel was ineffective or because the Florida statute precluded evidence of nonstatutory mitigating circumstances. The Florida statute in effect at the time did not expressly limit the jury's consideration to the mitigating circumstances delineated therein. Although

dictum in Cooper v. State. 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), suggested that the statutory mitigating circumstances were exclusive, decisions of the Florida Supreme Court published prior to the trial indicate that the statutory mitigating circumstances were not exclusive. Those cases are reviewed in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The Petitioner suggests that his counsel was ineffective at the penalty phase of the trial because he did not adduce testimony of a psychologist discussing Petitioner's character and his capacity for redemption. Petitioner embodied in his Amended Petition at page 41 an excerpt from a report by a psychologist used at his executive clemency hearing as an example of what effective counsel should have offered. This type evidence Petitioner claims would have had two purposes. One would be to show doubt of guilt - the other to show Petitioner's capacity for rehabilitation. Counsel can hardly be considered ineffective in a capital case because at the penalty phase he did not adduce evidence to raise a doubt of guilt. Obviously at that stage, doubt of guilt has been eliminated as an issue for the jury's consideration. Counsel cannot be held ineffective, unless his choice of strategy was so patently unreasonable that no

competent attorney would have chosen it and actual and substantial prejudice resulted from the choice. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Wiley v. Wainwright, 709 F.2d 1412 (11th Cir. 1983). In the present case, substantial evidence as to Petitioner's character and background was presented to develop mitigating factors, and Petitioner's attorney strongly argued to the advisory jury the possibility of rehabilitation. In light of what was done, counsel cannot under the established standard be deemed ineffective for not producing opinion evidence from a psychologist.

The seventh ground for relief is stated as follows in the petition: "Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to Petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after Petitioner rejected the plea offer and proceeded to trial." Even if Petitioner's factual assertions are true, this ground is patently without merit. The argument of the Petitioner basically is that having rejected the tendered

plea agreement, he could go to trial with immunity from the death penalty. The Petitioner cites North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. Jackson, 390 U.S. 570 (1968), and Corbitt v. New Jersey, 439 U.S. 212 (1978) as supporting his contention. None of these cases supports the contention, and Bordenkircher v Hayes, 434 U.S. 357 (1978) stands clearly in opposition.

The eighth ground for relief is that, "The Florida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present." This ground is without merit and subject to summary dismissal on the authority of Barclay v. Florida, supra.

The ninth ground for relief is that, "The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the

review of capital prosecutions." With respect to this ground the Petitioner argues that the Florida Supreme Court failed to review the aggravating circumstances, failed to review the claim that nonstatutory mitigating factors should have been found, and failed to review the trial court's failure to find as mitigating the mental or emotional problems of the Petitioner and doubt about his guilt.

With regard to the assertion that doubt about guilt should enter into the sentencing equation, the Petitioner's contention is without any support known to this court. The sentencing aspect of the trial does not commence until guilt has been established. Therefore, doubt about guilt should not enter the sentencing process. If a doubt about guilt exists, such would be a ground for a reversal of the conviction itself.

It is clear from the dissent in connection with the plenary appeal that the mental and emotional problems of the Petitioner were considered by the Florida Supreme Court. Furthermore, the opinion of the majority reflects that the case was carefully reviewed on the grounds presented.

The Petitioner's penultimate ground for relief challenges the Florida Supreme Court's former practice of reviewing psychological profiles of persons sentenced to death. This ground for relief has been foreclosed by Ford v. Strickland, supra.

The final ground for habeas relief is: "As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and judge."

Most of the argument embodied in the petition in support of this ground has been foreclosed by Proffitt v. Florida, supra, wherein the Supreme Court held the Florida death penalty statute to be constitutional. The following are the only arguments of Petitioner which warrant comment in the opinion of this court. The Petitioner claims that the instruction on aggravating and mitigating circumstances did not require the state to prove aggravating circumstances beyond reasonable doubt. This is simply inconsistent with the trial court's instructions which did

require proof of aggravating circumstances beyond reasonable doubt. The Petitioner also complains that the jury instructions did not tell the jury how to determine whether or not the mitigating circumstances outweighed the aggravating circumstances. The answer to this is that the statutory scheme obviously requires a value judgment from the jury and the trial judge. It is not for that reason invalid. Barclay v. Florida, supra, Slip Op. at 10.

Next the Petitioner asserts that the trial judge's instructions could have left the jury with the impression that the burden of proving mitigating circumstances was on the Petitioner. Aside from the fact that such does not appear to be a logical conclusion from the instructions themselves, it does not make sense to talk of burdens of proof in connection with evidence of mitigating factors. This is so because no particular quality of proof is required to permit the jury to give probative effect to evidence tending to establish mitigation. The trial judge instructed the jury:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more

> mitigating circumstances and give that evidence such weight as you feel it should receive . . . (Emphasis added)

Transcript of Advisory Hearing at 57.

Finally, the contention is made that nonstatutory factors affect the imposition of the death penalty. The Petitioner asserts such factors as geography, sex of the defendant, occupation and race of the victim, as well as others may have influence on the sentencing decisions of the trial jury or trial judge, or both. This argument was rejected as a matter of law in Spenkelink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978), where the court held:

> . . . if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness-and therefore the racial discrimination-condemned in Furman have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

It is obviously impossible for the legislature to devise any statutory scheme that will insure completely uniform results. Where, however, a statute has adequate safeguards against capricious imposition of the death

penalty, and the statutory procedure is followed, disparate results in similar cases are not a constitutional problem in the absence of intentional discrimination on an impermissible basis. Such is not alleged here.

Conclusions

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts contemplates that on initial review of the petition by the district court, the judge may summarily dismiss the petition in its entirety if the petition lacks arguable merit. The court has carefully reviewed the Amended Petition, all attachments thereto and the entire record from the state trial court. Based thereon, this court concludes the Amended Petition lacks arguable merit and should be summarily dismissed without an evidentiary hearing.

DATED at Orlando, Florida, this 22nd day of September, 1983.

JOHN A. REED, JR.
Judge

Copies mailed to:

Richard B. Greene, Esquire
Richard E. Burr, III, Esquire
Assistant Public Defenders
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401

Richard B. Martell, Esquire
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

Mr. James Ernest Hitchcock
Florida State Prison
Box 747
Starke, Florida 32091

Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

27